76-4711

IN THE

Supreme Court of the United States

October Term, 1976

No.

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

v.

ANTHONY CONSOLAZIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Preliminary Statement

The District Attorney of Nassau County, on behalf of the People of the State of New York, seeks certiorari to review an order of the Court of Appeals of the State of New York, entered July 6, 1976. That order, insofar as here pertinent, reversed an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered March 31, 1975, which, pursuant to an appeal by the People, had reinstated certain counts of the indictment against Anthony Consolazio which had been dismissed by nisi prius during the trial of the indictment.

Opinions Below

The County Court of Nassau County at the conclusion of the People's case, upon motion of defendant Anthony Consolazio, dismissed 41 counts of the indictment for insufficient evidence as a matter of law without a formal, reported opinion (Appendix A).

The opinion of the Appellate Division affirming the judgment of conviction and reinstating 39 of the dismissed counts appears at 47 A.D.2d 683, 366 N.Y.S.2d 190 (2d Dept. 1975) (Appendix B). The opinion of the New York Court of Appeals is reported at 40 N.Y.2d 446 (Appendix C).

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). The New York Court of Appeals decision is dated July 6, 1976.

Question Presented

Whether the Double Jeopardy Clause of the United States Constitution precludes an appeal by the State from a nisi prius order dismissing, solely on legal grounds, counts of an indictment if that order is entered during trial rather than before the trial or after a conviction?

Constitutional Provision and Statutes Involved

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> • • • [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb • • •.

2. New York Criminal Procedure Law section 450.20 [subd. 2] provides:

> An appeal to an intermediate appellate court may be taken as of right by the people from the following sentence and orders of a criminal court:
>
> • • •
>
> — A trial order of dismissal, entered pursuant to section 290.10 or 360.40;

3. New York Criminal Procedure Law section 290.10 [subd. 1] provides:

> At the conclusion of the People's case or at the conclusion of all the evidence, the court may, • • • upon motion of the defendant, issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.

4. New York Criminal Procedure Law section 70.10 [subd. 1] provides in relevant part:

> "Legally sufficient evidence" means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof • • •.

Statement of the Case

From 1968 to 1971, Anthony Consolazio, a Long Island attorney, approached numerous people in his community with proposals that they invest in various schemes yielding quick, high interest returns. Many of these people, who knew Consolazio as an attorney, friend, customer, neighbor, or employer, gave him money. None of them received any substantial portion of their "invested" monies back.

Consolazio was indicted in June of 1972 for the crimes of grand larceny in the second degree (44 counts), and grand larceny in the third degree (13 counts). The indictment basically alleged, in chronological order, multiple larcenies from various victims from January 1968 to June 1972.

Trial began on September 18, 1973. Consolazio was convicted on six counts, five of grand larceny in the second degree and one of grand larceny in the third degree. Nine counts were dismissed at the end of the People's case with the consent of the People. Forty-one counts were dismissed by the court at the conclusion of the People's case pursuant to a motion by the defendant (New York CPL §290.10). The trial court held that the People had not presented evidence which was legally sufficient to establish the charged offenses.

Both parties appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department. Consolazio appealed his conviction. The People, pursuant to New York CPL §450.20(2), appealed

from the trial order of dismissal. The Appellate Division unanimously affirmed the conviction and reinstated the majority of the dismissed counts, holding that "in our opinion, there was legally sufficient evidence to support" those counts. *People* v. *Consolazio,* 47 A.D.2d 683, 366 N.Y.S.2d 190 (1975) (Appendix B). Consolazio then sought and obtained permission to appeal the order of the Appellate Division affirming the judgment and reinstating the dismissed counts of the indictment to the New York Court of Appeals.

On appeal to the Court of Appeals, that Court affirmed Consolazio's judgment on grounds unrelated to the petition, but reversed that portion of the order of the Appellate Division of the Supreme Court, Second Judicial Department, which had reinstated the dismissed counts of the indictment. (Appendix C) The Court of Appeals' rationale was based on its decision in *People* v. *King Brown,* 40 N.Y.2d 381 (1976), *pet. for cert. pending* (Appendix F), a case argued with *Consolazio* but decided almost three weeks before *Consolazio.*

ARGUMENT

Whether the Double Jeopardy Clause precludes an appeal by the State from a nisi prius order, entered in-trial, dismissing, solely on legal grounds, counts of an indictment, presents a troublesome, unresolved, important question of law in the administration of criminal justice.

On May 6, 1976, argument was heard in the New York Court of Appeals on a group of cases, including the instant one, wherein the constitutionality of New York's CPL §450.20(2), a statute permitting the People to appeal from

a trial order of dismissal, was tested against this Court's decisions in *United States* v. *Wilson,* 420 U.S. 332 (1975); *United States* v. *Jenkins,* 420 U.S. 358 (1975); and *Serfass* v. *United States,* 420 U.S. 377 (1975). Just seven months before the statute had been held constitutional in *People* v. *Sabella and Fellman,* 35 N.Y.2d 158, *remittitur amended* 35 N.Y.2d 853 (1974), wherein the New York Court of Appeals had considered the constitutionality of the statute in the light of the Double Jeopardy Clause and had held that the statute was not, *per se,* unconstitutional, but rather that its constitutionality depended upon whether the trial court had based its dismissal on a purely legal ground (*Fellman*), or upon a factual ground, however denominated (*Sabella*). The court ruled that double jeopardy did not bar a People's appeal in the former case but did in the latter.

In a decision primarily set forth in *People* v. *Brown,* 40 N.Y.2d 381, *petition for certiorari pending* (Appendix F), the Court of Appeals reversed itself in a divided opinion (JONES, GABRIELLI, WACHTLER, FUCHSBERG and COOKE, JJ., for majority; BREITEL, C.J., and JASEN, J., in dissent). The majority, "upon constraint" of *Wilson, Jenkins* and *Serfass* concluded that this Court has adopted "what may be characterized as a mechanical rule * * *", *i.e.*, "[t]he inescapable rule which the Supreme Court has fashioned in those cases is that the double jeopardy clause precludes the People from appealing a trial court's order dismissing an indictment where retrial of the defendant, or indeed any supplemental fact-finding, might result from appellate reversal of that order sought to be appealed."*

* The Court of Appeals, in its opinion in *Brown,* speculated that had nisi prius chosen not to terminate the trial on the basis of his legal conclusion as to what constituted the elements of the offense there

(footnote continued on next page)

The dissenters, including Chief Judge Breitel, suggested that this Court, in *Serfass,* had indicated that the double jeopardy clause did not necessarily bar a retrial where the decision of the trial judge was, as is the case herein (see Appendix A), founded on a pure question of law, and that application of historic and current double jeopardy principles supported that conclusion.

Both the federal government [18 U.S.C. §3731] and many states* have statutes which, explicitly or by implication, permit the prosecutor to appeal from the dismissal of an indictment during trial. In the wake of this Court's double jeopardy *Wilson, Jenkins* and *Serfass* trilogy, many jurisdictions have evinced a good deal of confusion over the manner in which the constitutional mandate of this Court is to be applied. In some instances, a "mechanistic" approach similar to New York's has been applied. *See, e.g., United States* v. *Means,* 513 F.2d 1329 (8th Cir. 1975); *State* v. *Kleinwaks,* 61 N.J. 328, 345 A.2d 793 (1975). Other courts have favored a more interpretative approach similar to the pre-*Brown* holding of the Court of Appeals in *Sabella.*

charged [bribery], the jury, under a charge which would necessarily have included the court's conclusion as to the elements of that offense, would have been forced to acquit. In all fairness to the People in *Brown,* such speculation is hardly the stuff upon which to base principles of constitutional significance. In any event, such dogmatic speculation would be here unwarranted since the prosecutor maintained (and the Appellate Division agreed) that the evidence of the crime was legally sufficient, and we know the jury convicted Consolazio on all the remaining counts wherein a near-identical larcenous *modus operandi* was extant.

* The statutes in question, and the cases interpreting them, are catalogued in the petition for certiorari of the New York County District Attorney in *People* v. *King Brown.* In the interests of brevity and to avoid unnecessary repetition, they are not repeated here.

See, e.g., State v. *Lewis,* 96 Idaho 743, 536 P.2d 738 (1975); *State* v. *Russo,* 70 Wisc.2d 169, 233 N.W.2d 485 (1975); *United States* v. *Patrick,* 532 F.2d 142 (9th Cir. 1976). Few other issues of criminal law in recent memory have brought forth such a plethora of conflicting interpretations and contradictory conclusions as has the instant one.

The *Wilson, Jenkins* and *Serfass* trilogy has left the state of double jeopardy law applicable here in a state of ambiguity or unexplained illogic. If a motion to dismiss an indictment or count thereof on the legal ground of insufficient evidence is made before trial and granted, the Government may appeal *per Serfass* to reinstate the indictment. If after trial a motion to set aside the conviction on the legal ground of insufficient evidence before the petit jury is made and granted, the Government may appeal *per Wilson* to reinstate the conviction. If either of the two motions is denied and a defendant is statutorily permitted to appeal that denial, appellate review is constitutionally permissible. *United States* v. *Ball,* 163 U.S. 662 (1896). The "practical" justification for *Ball* is that it is "fairer" to both the defendant and the Government. *Wilson,* p. 343 n. 11. If during trial the government moves to dismiss an indictment or count thereof on the legal ground of a jurisdictional defect in the pleading, and the court concurs in the evaluation of the merits of that legal ground, and the court is correct, a mistrial and a second trial is proper. *Illinois* v. *Somerville,* 410 U.S. 458 (1973). The in-part rationale of *Somerville* is that it would be "wasting time, energy and money for all concerned" to require the first trial to proceed to a verdict—speculatively—of guilt, then appeal, leading to a reversal on the law and a second trial. *Somerville* at 469. If during the trial the defendant moves to abort the trial because he believes that judicial or prosecutorial error prejudices his prospects of an acquittal and he would, by a continuation of the proceedings, face the stigma of conviction, followed by a lengthy appeal and, if a reversal is secured, by a second prosecution, the court may grant a mistrial and second trial is permissible. *United States* v. *Dinitz,* —— U.S. ——, 96 S.Ct. 1075 (1976).

In *Consolazio,* defendant made a motion which, if granted before trial or after a verdict of guilt or if denied during the trial, could constitutionally be reviewed on appeal. However, nisi prius in *Consolazio* granted the defendant's motion during trial. And, even though it was defendant who sought to abort the trial and persuaded the court (probably erroneously) to abort the trial by resolving a question of law in his favor [*cf. United States* v. *Ball, supra; United States* v. *Dinitz, supra*], and even though nisi prius undoubtedly believed it would be a waste of time, energy and money for all concerned to proceed to verdict, and then to either a motion to vacate the conviction or appeal and (in his judgment) reversal [*cf. Illinois* v. *Somerville, supra*], we are told by the New York Court of Appeals that, contrary to the Court of Appeals' own reasoning, this Court has precluded a Government appeal. That conclusion flies in the face of the logic, practicality, and fairness permeating this Court's rulings on double jeopardy.

Jenkins is the fountainhead of the Court of Appeals' holding. Plainly, *Jenkins* involved the possibility of the trial court having, during trial, reviewed the merits of the facts of the case and thereby having effectively acquitted

Jenkins; fairness and practicality in the administration of the double jeopardy clause's long-standing prohibition against retrying an acquitted defendant dictated against guessing whether the court had acquitted Jenkins or permitting the trial court to second-guess itself.

Jenkins, however, used language which, in candor, could be read and in *Consolazio* was read as indicating that the double jeopardy clause would be violated where "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged" would be required even upon an appellate reversal and remand predicated upon an in-trial question of law erroneously resolved in defendant's favor, upon defendant's motion, and terminating the proceeding. But a week after *Jenkins* this Court decided *Serfass.* In the course of holding that the Government could appeal a successful defense pre-trial motion to dismiss the indictment, this Court stated:

> "[W]e, of course, express no opinion on the question whether a similar ruling by the District Court after jeopardy had attached would have been appealable." *Serfass* at 394.

If that means what it plainly appears to mean, then the Court of Appeals, at best, may have reached the correct result for the wrong reason, and this Court should take the instant opportunity to set at rest a troublesome and important question of law in the administration of criminal justice.

Conclusion

The petition for certiorari should be granted.

Respectfully submitted,

DENIS DILLON
District Attorney
County of Nassau

WILLIAM C. DONNINO
ANTHONY J. GIRESE
Assistant District Attorneys
Of Counsel

October, 1976

APPENDICES

APPENDIX A

AT a Trial Term of the County Court, Nassau County, held at the County Courthouse, 262 Old Country Road, Mineola, New York, on the 10th day of January, 1975.

P R E S E N T :

HONORABLE ALEXANDER VITALE,

County Court Judge.

----------X

THE PEOPLE OF THE STATE OF NEW YORK — Indictment #34893

- against -

ANTHONY CONSOLAZIO, — TRIAL ORDER OF DISMISSAL

Defendant.

----------X

The above captioned matter having come before the Court for purposes of trial, and upon oral motions made on behalf of defendant by his counsel at the close of the People's case for a trial order of dismissal with respect to each and every count of the indictment, and the matter having duly come on to be heard by this Court and argued by both sides, and due deliberation having been had thereon, and this Court having granted said oral motions in part, on October 16, 1973 and October 17, 1973, for the reasons and as set forth in the stenographic transcript of trial minutes, pages 2203-2209 inclusive and 2245-2247 inclusive thereof, it is hereby

ORDERED that the motions made on behalf of the defendant for a trial order of dismissal at the conclusion of the People's case, are hereby granted to the extent that the following enumerated counts of the above designated indictment are dismissed, pursuant to C.P.L. § 290.10: Counts numbered 1, 3, 4, 5, 6, 11, 13, 15, 17, 18, 20, 21, 22, 24, 25, 27, 29, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 and 56.

Alexander Vitale

Judge, County Court

AFTERNOON SESSION

THE CLERK: People versus Anthony M. Consolazio.

(The following occurred in chambers)

THE COURT: The defendant was indicted upon 57 counts charging him variously with grand larceny in the second degree or in the third degree committed, it is alleged, upon 31 different individuals. At a point in the trial count 57 was severed from the remaining counts.

People have now completed their proof and the defendant has moved for a trial order of dismissal as to each count.

Larceny is defined as having occurred when with intent to deprive another of property or to appropriate the same to himself or to a third person one wrongfully takes, obtains or withholds such property from an owner thereof.

The conditions under which this takes place are set forth in the statute as including obtaining property by false pretenses and obtaining property by a false promise.

The Court is not required to render a ruling upon the law as to all counts of the indictment by reason of the following.

During the course of the trial the People at various times stated that they would not introduce evidence with

reference to certain counts.

These were the following. Counts 8, 9 and 10 wherein the complainant was Michael Guidice, count 12, complainant Anthony Guidice, count 14, complainant Mauro Margodonna, count 31, complainant Savino Guidice.

George Jacklin, the complainant in counts 2 and 7, took the stand but was withdrawn after a few questions were asked. The People thereafter consented that his testimony be deemed struck from the record.

The complainant in count 16, John J. Macaluso, did testify. However, today while the assistant District Attorney was arguing in opposition to the motion for a trial order of dismissal made by the defendant, the said assistant did volunteer that it was his belief that this particular count be taken from the jury and dismissed by the Court.

A total of nine counts are therefore eliminated by reason of the foregoing action on the part of the People. In other words, these nine counts are regarded as having been dismissed on application of the People.

The next block of counts that the Court will consider insofar as the defendant's motion is concerned are counts numbered 3 to 56 both inclusive excepting therefrom, of course, counts numbered 7, 8, 9, 10, 12, 14, 16 and 31.

It becomes the Court's duty and function to determine

in effect if the evidence offered by the People is legally sufficient to establish the offense that may be charged in a particular count of the indictment or any lesser included offense.

It should be noted parenthetically that the same would include and be limited to in some instances grand larceny in the third degree and in all instances pettit larceny.

Count #19 alleges that the defendant committed the crime of grand larceny in the second degree in that on or between the 19th day of February 1970 to on or about the 16th day of June 1972 he stole certain property from Henny Hodgskin having an aggregate value of $3,200 with the intent to deprive the said Hodgskin of the use of the same and of the use and benefit thereof and to appropriate the same to his, the defendant's own use.

While the indictment alleges that $3,200 was stolen from him, his testimony upon the trial indicated that he in fact received $2,800 out of $5,000 originally turned over to the defendant.

He testified to conversations with the defendant wherein he said that he was told that if he would invest money with the defendant, he would receive a good return, that his money would be more secure than in a bank and that he would receive a higher return. That the investments to which his money would be applied would be in land development companies in Arizona and New Mexico.

I turn now to counts 23, 26 and 28, all of which allege variously or all of which allege that one Ruth Breslin was the subject of separate larcenies by the defandant.

This witness testified that the defendant called her on the telephone and that he spoke to her about investing money in real estate in Arizona. That he called her many times attempting to convince her to make these investments and said it was a good thing.

She saw him in his office where he repeated that this was a good investment and that she could make $1,000 in three months. It was a safe investment.

After the first transaction, this witness continued, the defendant telephoned again and said that he was offering her the same type of deal, a real estate investment, and that it was a safe one, a safe investment. That then she again spoke to the defendant where again he told her it was a good investment.

That at a later time when she was requesting her money, he told her that he had re-invested her money and that she told him in turn that this had been done without her permission and she wanted her money. The defendant promised to send it back.

The witness said at a later time that the defendant told her that a check from Arizona was not or had not cleared as yet and that was why she has not received

return of her money.

Counts numbered 54 and 55 allege that one Yolanda Thomann was the subject of a larceny perpetrated by the defendant.

This witness in her testimony said that she met the defendant at a party and the defendant told her that he had a real estate deal and asked her if she was interested in investing in it.

The defendant called her about eight days later and said if she would give him a certain amount he would invest it in a real estate deal and she would get $200 return on every thousand dollars so invested every two or three months.

He then called her again. The defendant accompanied her to the bank, told her to take out the money in cash and gave her a note for the money.

This witness said that the defendant told her if she needed the money he would return it on the spot. Any time she wanted her money he would give it back to her.

Mrs. Thomann continued with her testimony along the following lines. Two weeks after this transaction the defendant telephoned her again. He picked her up in his car, took her to the bank. She withdrew the money, walked over to the car and gave it to him. The defendant, according to her, said the same things that he said on the first occasion.

Upon cross examination this particular witness insisted that the defendant told her he would give her money. If she would give him money he would invest it in the real estate deal.

The Court has specifically alluded to these counts of the indictment and will now take up the question of the defendant's application insofar as count one is concerned.

This count of the indictment alleges that the defendant did defraud during the period January 2, 1968, to June 16, 1972, all of the individuals named in the indictment itself (with the exception of Mr. Nielsen named in count 57) of a total of $195,000 with the intention of depriving the owners thereof and of the use and benefit thereof and to appropriate the same to his own use.

(The following occurred in open court, in the absence of the jury)

THE COURT: Mr. Chase and Mr. Brandt, I have considered the defendant's motion for a trial order of dismissal addressed to each of the 57 counts of the indictment. I've dictated the decision in part to Mr. Gill. He'll read it to you. I'll pick up the remainder from the Bench.

(Whereupon, the proceedings in chambers were read by the reporter)

THE COURT: The overall consideration made by the

Court and the trial evidence of the People as such is that the People have met their obligation of creating an issue by the testimony offered as to the counts specifically referred to, namely counts 19, 23, 26, 28, 54 and 55 and count one.

As to the other counts I find that the evidence of the People is not legally sufficient to establish the offenses charged in them or any lesser included offense and as to those counts of the indictment the defendant's application for a trial order of dismissal is granted. Said order being, needless to say, granted at the close of the People's case and before the defendant has indicated if he intends to offer any evidence whatever.

Mr. Chase and Mr. Brandt, do you wish to be heard as to this decision before I take up any other motions that may be made, if any?

MR. CHASE: Yes, sir. You have permitted us to go forward then, as I understand it, on count one?

THE COURT: I have granted the defendant's application for a trial order of dismissal as to all counts except the ones I mentioned, namely count one.

As to that I deny the application for a trial order of dismissal and I similarly deny the trial order of dismissal as to counts 19, 23, 26, 28, 54 and 55.

MR. CHASE: Very good, sir. With respect to the trial order of dismissal which you have granted, as to those

THE CLERK: People versus Anthony M. Consolazio. Trial continued. People ready?

MR. CHASE: People ready.

THE CLERK: Defendant ready?

MR. BRANDT: Defendant ready.

THE COURT: Mr. Chase and Mr. Brandt, I have during this recess considered Mr. Brandt's request that the first count be dismissed from the standpoint, to begin with, the general prejudice that he says may accrue to the defendant under circumstances where 27 of the individuals mentioned in that count have in effect been found not competent within the sphere of the Criminal Law.

I have secondly considered again the language of Count 1, specifically that portion of it which states that the defendant between certain dates, namely January 2nd, 1968, to on or about June 16, 1972, stole certain property with an aggregate value of $195,000 "as set forth in the second through and including the fifty-sixth count of this indictment to which reference is hereby made with the intent to deprive the owners of the use and benefit thereof and to appropriate the same to the use of the defendant". And that coincidentally is the end of the count.

Turning now to the very end of the indictment itself, the phrase appears, all of the acts and transactions alleged

in each of the several counts of this indictment are connected together and form part of a common scheme and plan.

The problem will not go away as to whether or not Count 1 charges a separate crime as distinguished from the crimes charged against the defendant in Counts 19, 23, 26, 28, 54 and 55.

It cannot be said that the elements or rather, it cannot be said that the allegation not within the count itself but at the very end of the indictment of a common scheme and plan supplies an element which creates the alleged larceny from Mrs. Thomann, Mrs. Breslin and Mr. Hodgskin, a separate and distinct crime of grand larceny in the second degree.

It is true that the proof of the People if believed would show a course of conduct on the part of this defendant that appears relatively consistent insofar as these three individuals are concerned.

However, it is my considered judgment that the language of the indictment itself, namely "as set forth in the second through and including the 56th count of this indictment to which reference is hereby made" sets forth in effect what truly happened.

Namely, that the defendant was charged with separate crimes against various individuals, all of which were attempted to be grouped together in the first count of the

indictment and the grand jury handed it down the same in an attempt to thereby create the separate and distinct charge against the defendant of a major scheme to bilk these 30 individuals.

Under all of these circumstances, bearing in mind that 27 of these have been dismissed, it appears to me that the defendant's motion should be granted and I therefore recall the ruling of yesterday denying the defendant's request for a dismissal as to the first count of the indictment and I do grant the same.

MR. CHASE: Your Honor, I take it then that that was a trial order of dismissal you have just granted.

THE COURT: Yes. Because that was the application of Mr. Brandt. And I have granted this on the ground of the trial order of dismissal, not in the interests of justice, sir.

MR. CHASE: Thank you. Then may I take exception in order to preserve my rights?

THE COURT: Yes. You shall now, we will go into recess and begin the defendant's summation at 2:00 o'clock so that Mr. Chase may have an opportunity to rework his summation.

MR. CHASE: Your Honor, I think we all wish to be to a degree expeditious.

THE COURT: I am going to come back to a little homey

APPENDIX B

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 31, 1975.

HON. SAMUEL RABIN, Acting Presiding Justice,
[illegible]
HON. JAMES D. HOPKINS
HON. M. HENRY MARTUSCELLO
[illegible]
[illegible]
HON. JOHN P. COHALAN, JR.
HON. MARCUS G. CHRIST
[illegible]
[illegible]
[illegible]
Associate Justices

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The People of the State of New York, :

Appellant-respondent, : Order on Appeals from Judgment of Conviction and Orders.

v. :

Anthony Consolazio, :

Respondent-appellant. :

----------x

In the above entitled action, the parties have cross appealed to this court as follows: (1) the above named The People of the State of New York, plaintiff, appeals from (a) two trial orders of dismissal made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively, which dismissed 41 counts of the indictment, and (b) a written trial order of dismissal made by the same court and entered on January 10, 1975, dismissing said counts; and (2) the above named Anthony Consolazio, defendant, appeals from a judgment of the same court, rendered January 7, 1974, convicting him of grand larceny in the second degree (five counts) and grand larceny in the third degree, upon a jury verdict, and imposing sentence; and the said appeals having been argued by Jules E. Orenstein, Esq., of counsel for the appellant-respondent and argued by Michael J. Obus, Esq., of counsel for the respondent-appellant, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously affirmed, and it is further

ORDERED that the trial orders of dismissal appealed from are hereby modified, on the law, by deleting therefrom the enumeration of counts dismissed except counts 1 and 27 and motions for a trial order of dismissal denied except as to said two counts; and, as so modified, the orders are unanimously affirmed and new trial ordered as to the counts which are hereby thus reinstated and further proceedings not inconsistent with this court's opinion and decision slip, dated March 31, 1975, are directed, and it is further

ORDERED that the case is hereby remitted to the County Court,

People of the State of New York v. Consolazio

Nassau County, for proceedings to direct appellant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50, subd. 5).

Enter:

Clerk of the Appellate Division.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant-Respondent, v ANTHONY CONSOLAZIO, Respondent-Appellant.—Cross appeals as follows: (1) The People appeal from (a) two trial orders of dismissal made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively, which dismissed 41 counts of the indictment, and (b) a written trial order of dismissal made by the same court and entered on January 10, 1975, dismissing said counts; and (2) defendant appeals from a judgment of the same court, rendered January 7, 1974, convicting him of grand larceny in the second degree (five counts) and grand larceny in the third degree, upon a jury verdict, and imposing sentence. Judgment affirmed. Trial orders of dismissal modified, on the law, by deleting therefrom the enumeration of counts dismissed except Counts 1 and 27 and motions for a trial order of dismissal denied except as to said two counts. As so modified, orders affirmed and new trial ordered as to the counts which are hereby thus reinstated and further proceedings not inconsistent herewith are directed, including proceedings pursuant to CPL 460.50 (subd. 5). Defendant was indicted and charged with 57 counts of grand larceny in the second and third degrees, committed as part of a common plan or scheme. During the trial, one count was severed and nine were dismissed on consent. At the close of the People's case, trial orders of dismissal were granted as to 41 counts. With the exception of Count 1 (a general count naming all persons from whom defendant was accused of wrongfully taking money) and Count 27 (pertaining to a man to whom defendant made no representations), the orders of dismissal were improperly granted. In our opinion, there was legally sufficient evidence to support the other 39 counts under a theory of larceny by false pretenses or larceny by false promises (Penal Law, § 155.05, subd. 2, pars. [a], [d]; *People v Sabella*, 35 NY2d 158, 167). The prosecutor, during the course of the trial, denied that he had any prior statements of the complaining witnesses. It later appeared that he possessed question and answer sheets which had been filled in by a detective or an Assistant District Attorney. Prior to the new trial, a hearing should be held to determine the circumstances under which those documents were prepared and whether they should be given to defense counsel for the purpose of cross-examination *(People v Horton*, 19 AD2d 80). We have examined the documents as they relate to those counts of which defendant stands convicted and conclude that, even assuming that they should have been made available to him, no prejudice resulted from the failure to so make them available *(People v Byrams*, 34 AD2d 556). Rabin, Acting P. J., Hopkins, Martuscello, Cohalan and Christ, JJ., concur.

State of New York
Court of Appeals

2. No. 288
The People &c.,
Respondent,
vs.
Anthony M. Consolazio,
Appellant.

JONES, J.:

On this appeal, we agree with defendant that under principles of double jeopardy as enunciated by the United States Supreme Court the People were barred from appealing to the Appellate Division from the trial order dismissing certain counts of defendant's indictment. We reject, however, defendant's contentions that because his challenge to the jury panel was denied and because he was denied disclosure of prosecution notes of pre-trial witness interrogations, reversible error was committed with respect to those counts on which he was found guilty.

During the years 1968 to 1971, appellant, an attorney, approached numerous individuals in his community with proposals that they invest in various schemes yielding quick, high interest returns. Many of these people, who had known appellant as an attorney, friend, customer, neighbor or employee, gave him money; no significant portion of any of the "invested"

funds was ever returned. In consequence appellant was indicted on 57 counts, 44 for grand larceny in the second degree and 13 for grand larceny in the third degree. At trial in Nassau County Court one count was severed; 50 counts were dismissed at the conclusion of the People's case, nine with the consent of the prosecutor; and appellant was convicted on the remaining six counts. Cross appeals were taken to the Appellate Division. On appellant's appeal the six convictions were affirmed. On the People's appeal the Appellate Division reinstated 39 of the 41 counts which had been dismissed over the People's objection, and the dismissal of the other two counts was affirmed.

We first deal with the appeal taken to the Appellate Division by the People from the trial order of dismissal. Under our decision in People v Brown (39 NY2d ___, decided June 17, 1976) such appeal was barred under the Supreme Court's formulation of the right not to be placed twice in jeopardy. Accordingly the order of the Appellate Division must be modified, and the case remitted to that Court for dismissal of the appeal taken by the People to that Court.

As to the six counts on which the jury returned a verdict of guilty, appellant advances several contentions that errors committed during his trial require reversal of his convictions thereon. We conclude that none of such contentions is of sufficient substance to warrant reversal; some, however, merit brief attention.

It is first contended that the prosecutor's failure to turn over certain "worksheets" compiled in preparation for trial and the trial court's acquiescence in such refusal constituted reversible error. These worksheets were in the form of unsigned questionnaires containing printed questions (e.g., "When did you first meet Mr. Consolazio?" "Who introduced you to him?" and "How did it come about that you invested with him?") and handwritten notes made by the interviewing officer that capsulized the witness's answers thereto. During trial defense counsel requested that the

prosecution turn over (a) all exculpatory material as required under Brady v Maryland (373 US 83) and People v Simmons (36 NY2d 126) and (b) all prior statements made by prosecution witnesses as required under People v Rosario (9 NY2d 286, reargument den 9 NY2d 908, cert den 368 US 866, reargument den 14 NY2d 876, reargument den 15 NY2d 765). While the prosecutor turned over all grand jury testimony of each of the various witnesses, existence of the worksheets was not at that time revealed. When it came out later in the trial that such question-answer sheets did exist, defense counsel demanded their disclosure under both a Brady and a Rosario rationale. The trial court found that the worksheets did not fall within Rosario in that they constituted a person's "conception" of what a prospective witness told him rather than the "statements" of such witness. As to the Brady branch of the defense motion, the Court refused to examine all the worksheets as requested by defense counsel but rather accepted the prosecutor's representation that nothing contained in the questionnaires constituted exculpatory material.

At the Appellate Division that Court itself examined the worksheets and concluded that "even assuming that they should have been made available to [the defense], no prejudice resulted from the failure to so make them available". We concur in result.

With respect to the Brady aspect of appellant's argument, we agree that it was error for that Court not itself to have examined the worksheets to determine whether, as claimed by the defense, such worksheets contained exculpatory material. While a prosecutor must of necessity "have some discretion in determining which evidence must be turned over to the defense" (People v Fein, 18 NY2d 162, 171-172; emphasis in original), where, as here, there was some basis for argument that material in the possession of the prosecutor might be exculpatory, deference to the prosecutor's discretion must give way, and the duty to determine the merits of the request for disclosure then devolves on the trial court. We have, however, examined the worksheets, as did the Appellate Division, and we agree with that court that nothing contained therein constituted exculpatory material. Thus,

while we agree that the trial court erroneously relied on the representations of the prosecutor as to the nonexistence of exculpatory material, we conclude that such error was harmless. In so concluding, we find it to be of critical significance that the error related to the procedure by which it was determined that the worksheets contained no exculpatory material, not to the determination itself.

With respect to the Rosario branch of defendant's argument, we hold that the trial court erroneously concluded that the worksheets did not constitute "prior statements" of prosecution witnesses within the contemplation of the rule of that case. The character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature. Thus it has been held that a witness's statement in narrative form made in preparation for trial by an Assistant District Attorney in his own hand is "a record of a prior statement of a witness within the compass of the rule in People v Rosario ... and therefore not exempt from disclosure as a 'work product' datum of the prosecutor." (People v Hawa, 15 AD2d 740, affd 13 NY2d 718; and see People v Horton, 19 AD2d 80, affd 18 NY2d 355; cf People v Butler, 33 AD2d 675, affd 28 NY2d 499.) Accordingly we conclude that the prosecutor's worksheets, containing as they do abbreviated notes capsulizing witnesses' responses to questions relating directly to material issues raised on defendant's trial, fall within the reach of our holding in Rosario. Indeed this was obliquely recognized by the district attorney, who with commendable candor informed the trial court that the signatures of the witnesses were not affixed to the questionnaire forms when completed in the hope that Rosario disclosure could thereby be obviated.

Turning then to whether the withholding of such worksheets must here result in the setting aside of defendant's conviction, we conclude not in the circumstances of this case. We hold, of course, that a failure to turn over Rosario material may not be excused on the ground that such material would have been of limited or of no use to the defense, or that a witness's prior statements were totally consistent with his testimony at trial. (People v Malinsky, 15 NY2d 86, 90-91; People v Paige, 48 AD2d 6; cf People v Zabocky, 26 NY2d 530, 536-537; People v West, 29 NY2d 728; People v Peacock, 31 NY2d 907; People v Sanders, 31 NY2d 463.) We thus reject arguments that consideration of the significance of the content or substance of a witness's prior statements can result in a finding of harmless error.[1]

The present case, however, presents a significantly different issue. Our examination of the grand jury testimony of the various prosecution witnesses (which testimony was turned over by the prosecutor to the defense) reveals that the witness statements contained in the worksheets were the same as the statements made by such witnesses before the grand jury. The worksheets in this instance were nothing more than duplicative equivalents of statements previously turned over to the defense -- the only difference being as to the particular form in which such statements were recorded. In this circumstance it was not error to fail to turn over worksheets which would have been cumulative only. (Compare People v Kass, 25 NY2d 123, 127.)

1. To be distinguished are those appeals from pre-Rosario convictions as to which this Court applied a harmless error analysis where violations of the Rosario rule were found. (See, e.g., People v Rosario, 9 NY2d 286, 291, supra; People v Hernandez, 10 NY2d 774; People v Turner, 10 NY2d 839; People v Fasano, 11 NY2d 936; People v Hurst, 10 NY2d 929; People v Perira, 11 NY2d 784; People v Hawa, 13 NY2d 718, supra; People v Horton, 18 NY2d 355, supra; for a statement to this effect see People ex rel Cadogan v McMann, 24 NY2d 233, 237.)

In reaching the conclusion that we do in this case we make a supplemental observation. When Rosario material is requested by a defendant, in the ordinary situation it should be of negligible practical significance whether on comparative examination such material would or would not prove to be equivalent duplication of material already in the defendant's possession. On the one hand, if inspection were to lead to the conclusion that the material sought was a counterpart of other material already possessed by the defendant, the prosecutor would have infrequent occasion to object to its disclosure. On the other hand, if examination were to disclose that it was not a duplicative equivalent, then, of course, the defendant would be entitled to full disclosure. Reflection thus suggests that once it is determined that the writings sought by the defendant come within the Rosario rule, the better practice would be to direct a turn-over forthwith. No sufficiently useful purpose would appear to be served by engaging in a collateral analysis as to whether the defendant would or would not be technically entitled to disclosure.

We do not reach appellant's challenge to the jury panel. It is explicitly provided in CPL 270.10(2) that such a challenge must be made "in writing" and "before the selection of the jury commences, and, if it is not, such challenge is deemed to be waived". In this instance while a motion to challenge the jury panel was made orally before jury selection began (and then rejected) the written notice was not given until after selection of the jury had been completed although before any witness had been sworn. In this circumstance, irrespective of the willingness of the trial court to consider the motion on the merits, the error if any in the denial of the motion was not preserved for our review. We accord no substance to appellant's further contention that his challenge was predicated on constitutional grounds and that the strictures of § 270.10(2) apply only to challenges based on "departure from the requirements of the judiciary law." We read § 270.10(2) as intended by the Legislature to govern all challenges to the panel, whatever may be the particular ground advanced.

As to appellant's other contentions, it suffices to note that in our opinion the refusal of the trial court to charge explicitly with reference to "reliance" as an essential element of larceny by false premise was not error in view of the verbatim quotation of the applicable sections of the penal law in full. Similarly, in consequence of the failure of defense counsel to register a protest, any error with respect to the right of the jury to consider evidence presented to support the dismissed counts was not preserved for our review.

Accordingly the order of the Appellate Division should be modified by reversing so much of the order as reinstated 39 of the counts dismissed by the trial court and the case remitted to the Appellate Division with directions that the appeal by the People with respect thereto be dismissed, and, as so modified, the order should be affirmed.

* * * * * * * * * *

Order modified and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Jones, J. All concur.

Decided July 6, 1976

APPENDIX D

Remittitur

Court of Appeals
State of New York

The Hon. Charles D. Breitel, Chief Judge, Presiding

2 No. 288

The People &c.,
Respondent,
vs.
Anthony M. Consolazio,
Appellant.

The appellant(s) in the above entitled appeal appeared by James J. Mc Donough; *the respondent(s) appeared by* Denis Dillon, District Attorney, Nassau County.

The Court, after due deliberation, orders and adjudges that the order of the Appellate Division is modified and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein and, as so modified, affirmed. Opinion by Jones, J. All concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Second Department.

there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

Joseph W. Bellacosa

Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, July 6, 1976

APPENDIX E

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 20, 1976.

[redacted]
HON. JAMES D. HOPKINS, Acting Presiding Justice,
HON. M. HENRY MARTUSCELLO,
[redacted]
HON. JOHN P. COHALAN, JR.,
[redacted]
[redacted] *Associate Justices*
HON. MARCUS G. CHRIST,
HON. SAMUEL RABIN,
[redacted]
[redacted]

The People of the State of New York, :
Appellant-respondent, :
v. : Order on Remittitur from the Court of Appeals.
Anthony Consolazio, :
Respondent-appellant. :

The above named Anthony Consolazio, respondent-appellant in this action, having appealed to the Court of Appeals of the State of New York pursuant to permission granted by that court from an order of this court, dated March 31, 1975, which (1) unanimously affirmed a judgment of the County Court, Nassau County, rendered January 7, 1974, convicting him of grand larceny in the second degree (five counts) and grand larceny in the third degree, upon a jury verdict, and imposing sentence; (2) modified trial orders of dismissal of the same court, on the law, by deleting therefrom the enumeration of counts dismissed except counts 1 and 27 and denied motions for a trial order of dismissal except as to said two counts, and, as so modified, unanimously affirmed said orders, ordered a new trial as to the counts which were thus reinstated and directed further proceedings not inconsistent with this court's opinion and decision slip, dated March 31, 1975; and (3) remitted the case to the County Court, Nassau County, for proceedings to direct appellant to surrender himself to said court in order that execution of the judgment be commenced or resumed (CPL 460.50); and the said appeal having been heard and determined by the Court of Appeals and tha court, by order dated July 6, 1976, having modified this court's order, dated March 31, 1975, and remitted the case to this court with directions to dismiss the appeal taken by the People from (1) two trial orders made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively and (2) a written trial order of dismissal of the same court, entered on January 10, 1975;

Now, upon reading the remittitur from the Court of Appeals and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the appeal taken by the People to this court from the said trial orders of dismissal is hereby dismissed.

Enter:

Clerk of the Appellate Division.

1423 E/74 The People, etc., appellant-respondent, v. Anthony Consolazio, respondent-appellant.

James J. McDonough, Mineola, N.Y. (Michael J. Obus and Matthew Muraskin of counsel), for respondent-appellant.

Denis Dillon, District Attorney, Mineola, N.Y. (Jules E. Orenstein of counsel), for appellant-respondent.

On July 6, 1976 the Court of Appeals modified the order of this court (People v Consolazio, 47 AD2d 863) and remitted the case to this court with directions to dismiss the appeal taken by the People from (1) two trial orders of dismissal made orally in the County Court, Nassau County, on October 16, 1973 and October 17, 1973, respectively and (2) a written trial order of dismissal of the same court, entered on January 10, 1975.

Accordingly, the appeal taken by the People from the said trial orders of dismissal is dismissed.

HOPKINS, Acting P.J., MARTUSCELLO, COHALAN, CHRIST and RABIN, JJ., concur.

APPENDIX F

Court of Appeals Opinion

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs.

KING BROWN,
Respondent.

Decided June 17, 1976

JONES, J.:

We now hold that section 450.20(2) of the Criminal Procedure Law providing that the People may appeal a trial order of dismissal entered pursuant to CPL §290.10 is unconstitutional as violative of the right not to be placed twice in jeopardy for the same offense (N.Y.S. Constit., Art. I, §6; U.S. Constit., Amend. V) if "further proceedings of some sort devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand." (*United States* v. *Jenkins*, 420 US 358, 370).

We recently rejected a similar constitutional challenge to the People's statutory right to appeal such an order (*People* v. *Fellman*, 35 NY2d 158, mot to amd rem granted

35 NY2d 853). Subsequent to our decision in *Fellman*, however, the United States Supreme Court decided three cases which cast grave doubt as to the continuing viability of the *Fellman* decision (*United States* v. *Wilson*, 420 US 332, and *United States* v. *Jenkins*, 420 US 358, decided February 25, 1975, and *Serfass* v. *United States*, 420 US 377, decided less than a week later on March 3, 1975).[1] We reach our decision today under constraint of these decisions, and accordingly overrule our holding to the contrary in *People* v. *Fellman*, 35 NY2d 158, *supra*.

In this case defendant was charged in a one count indictment with having committed the crime of bribery as defined in Penal Law §200.00 which at the time of indictment provided:

> A person is guilty of bribery when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's * * * judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

At defendant's trial the People presented proof that, following the arrest of one Angel Rodriguez, defendant appeared at the local precinct station house and offered Rodriguez's arresting officer money in return for the release of Rodriguez. Following dilatory tactics, the arresting officer succeeded in having defendant repeat the bribe offer in the presence of another officer while a tape-recorder recorded the incriminating conversation.

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1. Both the First Department in the present case (48 AD2d 95) and the Fourth Department in *People* v. *Gesegnet* (47 AD2d 333) have concluded in the light of the recent Supreme Court trilogy, that *Fellman* is no longer controlling and that CPL §450.20(2) is unconstitutional. The Second Department has reached a contrary conclusion in *People* v. *Brooks* (50 AD2d 319).

At the conclusion of the People's case-in-chief, defendant moved pursuant to CPL §290.10[2] for a trial order of dismissal on the ground that a prima facie case of his guilt of bribery had not been made out. Defendant argued that the statute under which he had been indicted included as an element of the crime an "agreement or understanding" shared by the public servant sought to be influenced as well as by the bribe offeror and that the People had failed to establish a prima facie case because of insufficiency of proof as to this element. The prosecutor agreed that no evidence had been introduced to show that the police officer had entered into a corrupt agreement or understanding but argued that the statute did not require such a showing. Under the prosecutor's analysis, the statutory term "agreement or understanding" referred only to the defendant's state of mind and not to the state of mind of both the defendant and the public servant.

There was thus presented to the trial court a pure question of law, namely, what constitutes the crime of bribery? The court concluded that the "phrase [agreement or understanding] embraces an exchange of promises by both persons or a mutual understanding that in return for the benefit or money offered to the public servant—the offeree—that person will take or will not take certain action or would make or not make a certain decision." Since the People had offered no proof of such an agreement or mutual understanding, the court granted defendant's motion and entered a trial order of dismissal.

2. CPL §290.10 provides in pertinent part:

> 1. At the conclusion of the people's case or at the conclusion of all the evidence, the court may, except as provided in subdivision two, upon motion of the defendant, issue a "trial order of dismissal," dismissing any count of an indictment upon the ground that the trial evidence is not legally sufficient to establish the offense charged therein or any lesser included offense.
>
> 2. Despite the lack of legally sufficient trial evidence in support of a count of an indictment as described in subdivision one, issuance of a trial order of dismissal is not authorized and constitutes error when the trial evidence would have been legally sufficient had the court not erroneously excluded admissible evidence offered by the people.

Pursuant to CPL §450.20(2)[3] the People took an appeal to the Appellate Division. Less than 10 days before argument of that appeal, the United States Supreme Court handed down its decision in *United States* v. *Wilson* (420 US 332, *supra*) and in *United States* v. *Jenkins* (420 US 358, *supra*) establishing the principles by which it is to be determined in what circumstances the government may appeal from an adverse ruling in a criminal trial without violating a defendant's right not to be placed twice in jeopardy for the same offense. Relying on those decisions, the Appellate Division unanimously dismissed the appeal by the People on its analysis that, if the People were to prevail on appeal, a new trial would be required and that a second trial would violate defendant's rights under the federal double jeopardy clause.[4] The Court stated its reasons as follows:

> "We read [*Jenkins* and *Wilson*] as holding that only where there has been a jury verdict of guilty or findings by the court in a nonjury trial to support a verdict of guilty, but the trial court in either case then finds in the defendant's favor on a question of

3. CPL §450.20(2) provides that the People may take an appeal as of right to an intermediate appellate court from a trial order of dismissal entered pursuant to CPL §290.10. For the legislative history underlying this provision see *People* v. *Sabella* (35 NY2d 158, 164-165).

4. In dictum, four of the five justices at the Appellate Division indicated that, had they reached the merits of the case before them, they would have concluded that the People had made out a prima facie case of bribery; under their interpretation of Penal Law §200.00 there was no requirement that the People prove that the police officer to whom the bribe was offered agreed or understood that his decision or exercise of discretion would thereby be influenced.

Because our jurisdiction on this appeal extends only to the correctness of the dismissal of the appeal at the Appellate Division (CPL §470.60[3]) and because of our disposition of this appeal, we express no view as to the correctness of the trial court's interpretation of Penal Law §200.00 on which the trial order of dismissal was predicated.

law, will appeal be permitted. In such case the Double Jeopardy Clause does not bar an appeal because errors of law may be corrected and the guilty verdict reinstated without another trial." (48 AD 2d at 98.)

On the present appeal, the People argue that the Appellate Division incorrectly distilled from the *Jenkins* and *Wilson* decisions that the only relevant consideration in determining whether the government may appeal from an unfavorable criminal trial ruling is whether, if such appeal should prove successful, the defendant would be required to stand retrial. The People urge that whether a new trial will be required should be viewed as only one of two factors to be considered; of equal importance, it is urged, is whether the trial court's order was an "acquittal" or otherwise based on factual findings "favorable" to the defendant. While there is much in logic to support such an analysis (cf. *People* v. *Sabella,* 35 NY2d 158, *supra;* Government Appeals of "Dismissals" in Criminal Cases, 87 Harv L Rev 1822, 1837-1841; Twice in Jeopardy, 75 Yale L Jnl 262), we conclude that the Supreme Court by its recent trilogy of double jeopardy cases has expressly rejected any such analysis and has interpreted the federal double jeopardy clause exactly as did the court below. As that clause, found in the federal constitution, is binding on the states (*Benton* v. *Maryland,* 395 US 784), we accordingly are constrained to conclude that the order at the Appellate Division dismissing the appeal to that Court must now be affirmed.

Analysis of the limits imposed by the double jeopardy clause on the availability to the prosecution of appeals from trial orders of dismissal necessarily turns on ascertaining the purpose which that clause may be said to effectuate. "Since the prohibition in the Constitution against double jeopardy is derived from history, its sig-

nificance and scope must be determined, 'not simply by taking the words and a dictionary, but by considering [its] * * * origin and the line of [its] * * * growth'." (*Green* v. *United States,* 355 US 184, 199 [Frankfurter, J., dissenting].) It thus serves to recognize that the prohibition against being placed twice in jeopardy actually encompasses three prohibitions: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." (*North Carolina* v. *Pearce,* 395 US 711, 717 [fns omitted].) Each "protection" serves different purposes and is surrounded by its own exceptions thereby complicating exposition of which rule attaches in different procedural situations. (For a critical analysis that "the judiciary is content to apply the double jeopardy prohibition with only a reverent nod to its policies" and without scrutiny of these policies, see Twice in Jeopardy, 75 Yale L Jnl 262, *supra.*)

In the present case we are concerned with that function of double jeopardy which protects against retrial for the same offense following a previous acquittal thereon. In *United States* v. *Green,* 355 US 184, 187, *supra,* the Supreme Court analyzed the purposes and policies underlying this aspect of double jeopardy:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

(See also *United States* v. *Jorn*, 400 US 470, 479.) Thus the Supreme Court has identified two policies which underlie the prohibition against retrial following acquittal—prevention of harassment of criminal defendants and prevention of unjust convictions by subjection of defendants to repeated criminal trials until a factfinder may be found who will agree to convict. While both policies are equally expressive of the maxim at common law, *nemo debit bis vexari pro una et eadem causa* (no one should be twice vexed for one and the same cause), it readily appears that, depending on which policy is considered paramount, the question as to whether the double jeopardy clause permits to the government an appeal from a trial order of dismissal will result in different and even opposite answers. Thus if the policy underlying that clause is to prevent a defendant from suffering the "embarrassment, expense and ordeal" of a retrial should the government prevail on its appeal from a trial order of dismissal, then the answer can only be that such appeal is barred by the double jeopardy clause. If on the other hand the predominant purpose is to prevent unjust convictions secured after repetitive trials before successive triers of facts, then an appeal by the government from a trial order dismissing an indictment on a pure question of law (as in the present case) should not be barred by the double jeopardy clause. In the latter case, the question of a defendant's guilt would have been withdrawn from the trier of fact on the basis of a determination of law by the trial court and should such legal ruling be reversed on appeal and defendant required to stand retrial, there would be no enhanced probability of an unjust conviction secured through repeated prosecutions there having been no prior determination of factual innocence.

In the present case, the People argue that we should find as the controlling policy here to be applied the second policy or the prevention of unjust convictions. Such a contention is not without logic as support. The Supreme Court

has recognized in the context of premature termination of trials by declaration of mistrial that "the defendant's interest in proceeding to verdict [and thereby precluding a second trial] is outweighed by the competing and equally legitimate demand for public justice". (*Illinois* v. *Somerville*, 410 US 458, 471.) The "embarrassment, expense and ordeal" to a defendant whose first trial ended in a hung jury and who is forced to undergo retrial may be said to be equally as substantial as the harassment suffered by a defendant who, as in the present case, has yet to present any proof of his innocence. It is also argued that adoption of a rule permitting prosecution appeals only where no possibility could result therefrom that defendant would be required to undergo the ordeal of retrial appears to run counter to the Supreme Court's admonition that "we have disparaged 'rigid, mechanical' rules in the interpretation of the Double Jeopardy Clause. *Illinois* v. *Somerville*, 410 US 458, 467." (*Serfass* v. *Wilson*, 420 US 377, *supra;* see also *United States* v. *Jorn*, 400 US 470, 480, *supra* [a "mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide"].) Thus, while we recognize that permitting the People to appeal trial orders dismissing an indictment on a pure question of law could be determined not to be in contravention of the policy protecting against the securing of unjust convictions and that the corollary policy of protecting against harassment of defendants could be found to be "outweighed by the competing and equally legitimate demand for public justice" (such analysis was fundamental to our holding in *People* v. *Fellman*, 35 NY2d 158, *supra*), we conclude that the recent Supreme Court trilogy of double jeopardy cases mandates a contrary holding. We turn then to an analysis of these cases.

In *United States* v. *Wilson,* 420 US 333, the defendant was tried for converting union funds to his own use, the jury entered a verdict of guilty, but on a post-verdict motion the trial court dismissed the indictment on the ground that defendant had been prejudiced by delay between offense and indictment. The government took an appeal to the Court of Appeals pursuant to U.S.C. tit 18, §3731,[5] but that Court held that the double jeopardy clause barred review of the trial court's ruling. In so holding, the Court of Appeals "reasoned that since the District Court had relied on facts brought out at trial in finding prejudice from the pre-indictment delay, its ruling was in effect an acquittal." (420 US at 335.) On appeal to the Supreme Court the Government argued that "the constitutional restriction on governmental appeals is *intended solely to protect against exposing the defendant to multiple trials,* not to shield every determination favorable to the defendant from appellate review. Since a new trial would not be necessary where the trier of fact has returned a verdict of guilty, the Government [argued] that it should be permitted to appeal from any adverse post-verdict ruling." (*Ibid.;* emphasis supplied.) In reversing the order of dismissal at the Court of Appeals, the Supreme Court adopted the Government's arguments and held "that the constitutional protection against Government appeals attaches only where there is a danger of subjecting the defendant to a second trial for the same offense • • •" (420 US at 336.) The Court's holding was supported entirely by its analysis of the policies underlying the double jeopardy clause (420 US at 339-342; for further analysis of

5. That section provides in relevant part:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

such policies see Twice in Jeopardy, 75 Yale L Jnl 262, *supra*). On the basis of such analysis, the Court focused "on the prohibition against multiple trials as the *controlling* constitutional principle" (420 US at 346; emphasis supplied). Thus the Court concluded that "where there is no threat of either multiple punishment or successive prosecutions, the Double Jeopardy Clause is not offended" and that, in the case before it "[s]ince reversal on appeal would merely reinstate the jury's verdict, review of such an order does not offend the policy against multiple prosecution." (420 US at 344-345.)

While Wilson involved the constitutionality of prosecution appeals from trial court orders dismissing indictments following a verdict of guilty (and thus is instructive to the present case only in the analysis there engaged in by the Court), in *United States* v. *Jenkins* (420 US 358, *supra*) the Court was confronted with a government appeal from a trial order which dismissed the indictment following a bench trial but prior to the trial court's finding of facts on all elements of the crime charged. Thus the procedural posture of the appeal scrutinized in *Jenkins* may be said to be comparable to that here under review. In *Jenkins* the prosecution argued that, while appellate reversal of the trial court's order dismissing the indictment would require defendant to stand retrial, such retrial would not be in violation of double jeopardy principles since the trial order of dismissal was not grounded in factual determinations favorable to the defendant. The Court rejected that argument and held that the appeal was barred by the double jeopardy clause:

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. *But it is enough for purposes of the Double Jeopardy Clause,* and there-

fore for the determination of appealability under 18 U. S. C. §3731, *that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand.* Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. *The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor.* To subject him to any further such proceedings at this stage would violate the Double Jeopardy Clause: 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity • • •.' *Green* v. *United States, supra,* at 187." (420 US 369-379; emphasis supplied.)[6]

It may be asserted, and accurately, that in *Jenkins* the Supreme Court was confronted with a judgment discharging the defendant as to which it could not be said "with assurance whether it was, or was not, a resolution of the factual issues against the Government". (420 US at 369-370.) It was open to the Court in such circumstance to fashion a different rationale for the decision it made. The Court could easily have held that where the dismissal was not on

6. We consider it to be at least of some significance that in its quotation from *Green* as to the policy underlying the double jeopardy clause, the Court chose to include only the reference to preventing harassment of criminal defendants and excised the reference to prevention of unjust convictions (for full quotation of language in *Green* see p. 6, *supra*).

the law, i.e., where it was clearly on the facts or where it could not accurately be determined whether it was on the facts or the law, double jeopardy would preclude appeal. Consistently the Court could then have held that when the dismissal was clearly on the law alone there would be no double jeopardy bar. (Cf. *People* v. *Sabella,* 35 NY2d 158, *supra.*) But most significantly this rationale was not chosen as the basis of the Court's decision; on the contrary the touchstone was explicitly described as whether "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (420 US at 370).

In the third of the trilogy of cases, *Serfass* v. *United States* (420 US 377), the Court was confronted with an appeal from a pretrial order dismissing an indictment based on a legal ruling made by the trial court after its examination of records and an affidavit setting forth evidence to be adduced at trial. Conceding that "formal or technical jeopardy had not attached" at the time when the order dismissing the indictment had been entered, the defendant nevertheless argued in the Supreme Court that, because the pretrial ruling was based on evidentiary facts outside of the indictment, which facts would constitute a defense on the merits at trial, the ruling was the functional equivalent of an acquittal on the merits and accordingly that the policies of the double jeopardy clause would in fact be frustrated by further prosecution (420 U.S. at 389-390). The Supreme Court rejected that argument and in so doing stressed the importance of "the procedural context" in which the order dismissing the indictment was entered (420 US at 392). Thus the Court concluded that even if the order of dismissal might be characterized as an acquittal in a generic sense, such order "has no significance in this context unless jeopardy has once attached • • •." (*Ibid.*)

On the basis of these three cases we conclude that the Supreme Court has formulated a double jeopardy rule—albeit what may be characterized as a mechanical rule—which precludes the People from taking an appeal from an adverse trial ruling whenever such appeal if resolved favorably for the People might require the defendant to stand retrial—or even if it would then be necessary for the trial court "to make supplemental findings" (*United States* v. *Jenkins*, 420 US at 370, *supra*). Double jeopardy principles will bar appeal unless there is available a determination of guilt which without more may be reinstated in the event of a reversal and remand. Application of such rule to the provisions of CPL §450.20(2) permitting the People to appeal from a trial order of dismissal renders that section unconstitutional except in the instance where disposition of the motion is reserved until after the jury verdict has been returned.

The People argue that the purpose of the double jeopardy clause is to preserve for the defendant "acquittals" or "favorable" factual determinations but not to shield from appellate review erroneous legal conclusions not predicated on any factual determinations. Thus the People contend that double jeopardy plays no role in the present case where all factual conclusions were made favorably to the People and where dismissal was predicated solely on an erroneous conclusion by the trial court as to the issue of law.

In the light of the Supreme Court trilogy of cases, the People's argument must fail. At the outset the argument ignores what that Court termed the "controlling constitutional principle" in the context of application of double jeopardy principles to appeals by the government—"prohibition against multiple trials". (*Wilson*, 420 US at 345-346, *supra*.) In *Jenkins* the Court left no doubt that the touchstone in the resolution of whether such appeals may be permitted is whether retrial—or even supplemental fact-findings—would be necessitated by a successful government

appeal. The People's argument that whether retrial might follow a successful government appeal should be viewed as only one of two equally important factors is identical to the argument propounded by the government in *Jenkins* (see 420 US at 368) and was expressly rejected by that court (420 US at 369).

More significant, the Supreme Court has left no doubt that whether the trial court's order of dismissal was or was not grounded in factual determinations is immaterial to whether such dismissal may be appealed by the government. In *Wlison* the order sought to be appealed was predicated entirely on factual determinations which were adduced from evidence presented at trial. An appeal by the government was nontheless permitted. In *Jenkins* the Court could not have been more explicit in making it clear that the legal-factual dichotomy plays no role and that the concern of the double jeopardy clause extends no further than to the question whether retrial might follow a successful prosecution appeal (420 US at 370). It is instructive to note that when *Jenkins* was decided in the Court of Appeals, Judge Lumbard wrote a dissenting opinion grounded very much in the legal factual dichotomy propounded herein by the People (490 F2d 868, 880-885). In its opinion the Supreme Court expressly rejected the analysis proposed by Judge Lumbard (420 US at 365, fn. 7).[7]

The People further propose that the issue herein presented may be analogized to the issue presented by the case which, on a jury's inability to reach a verdict, terminates prematurely in a declaration of mistrial and as to which the

7. We cannot read Mr. Chief Justice Berger's language in his opinion in *Serfass* which focused the Court's holding in that case on the critical circumstance that jeopardy had not there attached—"we of course express no opinion on the question as to whether a similar ruling by the District Court after jeopardy had attached would have been appealable" (420 US at 394)—as designed significantly to cut back, or to signal a cut-back, in the decision in *Jenkins*, handed down but six days previously.

double jeopardy clause poses no bar to retrial (*United States* v. *Perez*, 22 US [9 Wheat] 579). (It was on the basis of exactly this analogy that the Appellate Division, Second Department, concluded in *People* v. *Brooks*, 50 AD2d 319, *supra*, that the *Wilson*, *Jenkins* and *Serfass* decisions do not require departure from our holding in *People* v. *Sabella*, 35 NY2d 158, *supra*). In the *Jenkins* decision, however, the Court expressly rejected this analysis, finding it "of critical importance" that in the hung jury line of cases the trial ended in a mistrial (not a determination "favorable" to any party) whereas in the present type of case trial terminates in an order dismissing the charges at issue (clearly a determination "favorable" to defendant). (420 US at 365, fn. 7.)

We note in passing that in the present case had there been no application for a trial order of dismissal or had the trial court chosen not to exercise his discretion in terminating the trial on the basis of his legal conclusion as to what elements constitute the crime of bribery, this case would undoubtedly have proceeded to the jury under a charge which would have included the trial court's interpretation of the bribery statute. In that event, since the People concededly had offered no proof on what the trial court would then have charged was a third element of the crime of bribery, the jury almost to a certainty would have acquitted this defendant, and it cannot be doubted that no appeal by the People would have lain from such acquittal (*Kepner* v. *United States*, 195 US 100, 130; *United States* v. *Ball*, 163 US 662, 671).

In sum we conclude that the issue presented in this case is directly controlled by the analysis articulated by the Supreme Court in the *Wilson*, *Jenkins* and *Serfass* decisions and, in particular, by the *ratio decidendi* in *Jenkins*. The inescapable rule which the Supreme Court has fashioned in these cases is that the double jeopardy clause pre-

cludes the People from appealing a trial court's order dismissing an indictment where retrial of the defendant, or indeed any supplemental fact-finding, might result from appellate reversal of the order sought to be appealed. It necessarily follows that in such instances CPL §450.20(2) cannot stand since it permits exactly that appeal which the Supreme Court has declared the double jeopardy clause will not tolerate.

It is worth adding that to characterize a rule of law as "mechanical" is not always to denigrate the rule. Any rule the application of which forecloses considerations of fairness and equity peculiar to the individual case must be regarded with particular attention and care. On the other hand there is great merit to a proper categorical rule which is easy of application and susceptible of reliable prediction. So it is with the double jeopardy rule formulated by the Supreme Court. Nor may this rule be expected to frustrate the "public's interest in fair trials designed to end in just judgments". (*Wade* v. *Hunter*, 336 US 684, 689.) While some difficulties may be encountered in cases now in the appellate process, the Appellate Divisions in two Departments have previously adopted what we, too, conclude is the rule of the Supreme Court. As to cases in the future, no great problems should be anticipated. In exercising his responsible discretion in deciding whether to grant a motion for a trial order of dismissal, the trial judge must now be aware that the consequence of granting such a motion prior to the return of the jury verdict will be to foreclose appeal by the prosecution. This is not to say that the granting of such a motion prior to verdict may not be fully warranted; it is to say that our decision introduces another consideration to be weighed in the disposition of an application for a trial order of dismissal.

For the reasons stated, the order of the Appellate Division should be affirmed.

BREITEL, Ch. J. (dissenting):

I dissent and vote to reverse and reinstate the appeal in the Appellate Division and remit to that court for further proceedings.

The Appellate Division misconstrued and therefore misapplied the holdings in *United States* v. *Jenkins* (420 US 358) and in *United States* v. *Wilson* (420 US 332). Those holdings stand for the proposition that whenever a criminal charge has been dismissed, in whatever way, after a fact-finding consideration of any of the elements of fact involved in the charge, there may not be a new trial on that charge. It makes no difference, after jeopardy has attached, at what stage in the trial, jury or non-jury, the consideration of the factual element occurred which resulted in the dismissal of the charge. Moreover, it is enough that the appellate court cannot say with assurance whether there was a resolution of any of the factual issues against the prosecution. A reading of *United States* v. *Jenkins* (*supra*), at pp. 368-370) supports the above analysis. It does not extend to the situation where it is clear beyond doubt that no factual issue has been resolved in favor of defendant on the trial. In such case the suggestion in *Serfass* v. *United States* (420 US 377, 394) is applicable, namely, that a trial interrupted by defendant's motion to dismiss on a pure question of law and the erroneous granting of such motion does not necessarily bar a retrial. Notably, the *Serfass* case was decided a week later than the *Jenkins* case.

There is no dispute concerning what occurred at the trial in this case. Notably, this was a jury trial and not a non-jury trial as was involved in the *Jenkins* case. The People gave proof that defendant King Brown offered money to

police to obtain the release from arrest of one Angel Rodriguez. Rodriguez had been arrested for possession of a stolen automobile. Immediately after the presentation of the People's case the trial court dismissed the indictment, on defendant's motion, on the ground that the People had failed to submit proof of an element of the crime of bribery. The trial court held that there was no proof whether any public officer had agreed or understood that his decision or exercise of discretion would be influenced by the offer of money. The People appealed.

Although a majority of the Appellate Division concluded that the trial court was in error as a matter of law in so holding, it nevertheless dismissed the appeal. It did so because the Appellate Division correctly observed that the crime of bribery did not require any agreement or understanding to accept a bribe for the purpose for which it had been offered.

The Appellate Division believed it was constrained, however, by the holdings in the *Jenkins* and *Wilson* cases (*supra*), on the view that double jeopardy had attached and that therefore a retrial of defendant would be barred. They indicated this view by their concurrence in part with the opinion of Mr. Justice Nunez who read the *Jenkins* and *Wilson* cases to require that a retrial, as well as an appeal, is prohibited unless there has been a finding by jury or bench at the trial level in favor of guilt by the defendant. Of course, if there had been a verdict of guilt, but set aside erroneously as a matter of law, correction of the error at the appellate level would not require a retrial, because the verdict or judgment could be reinstated (*United States* v. *Wilson*, 420 US 332, 352-353, *supra*). So Mr. Justice Nunez stated in his opinion: "since there has not been a verdict of guilty or a finding of facts sufficient to support the defendant's guilt, a successful appeal by the People would result in a second trial in violation of the operative principles of the Double Jeopardy Clause."

In so concluding, the Appellate Division has misapplied the cited cases. To recapitulate, the United States Supreme Court has held that where a judge, in terminating a non-jury trial, possibly made a finding of fact favorable to the defendant, no further proceeding was constitutionally permissible. For double jeopardy purposes, a termination of trial where it is unclear whether the basis was entirely or in some measure based upon a finding of fact, there is an acquittal as a matter of constitutional law, however the acquittal may be denominated.

In this case, however, there was not the slightest suggestion by the trial court that any of the People's proof was wanting in weight or credibility but instead the indictment was dismissed before anything had been submitted or considered by the fact-finders solely on a pure question of law. Since the jury never received the issues of fact there was never any possibility that a determination by the jury in favor of defendant had been made by them. Had the trial court in dismissing the indictment as a matter of law weighed any one or more of the elements of fact in the case, then the Double Jeopardy Clause applied and a retrial would be prohibited. Hence, the rule in the *Jenkins* case is inapplicable, because neither judge nor jury had passed on any issue of fact.

It is not true that in any case where a jury has been empaneled or proof has been taken which does not result in a finding of guilt that there is automatic double jeopardy. As the Court held in *Illinois* v. *Somerville* (410 US 458, 467) and reaffirmed in *Serfass* v. *United States,* (420 US 377, 390, *supra*): "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." If the termination of the trial is due to some "manifest necessity", such as the death of the judge, or because the termination is made on application of the defendant addressed to a pure

question of law, there is no double jeopardy, although jeopardy attached at the beginning of the trial (see *Illinois* v. *Somerville, supra,* at p. 468). In the case where the termination is by defendant's motion or at his instance the termination is his "fault" (see *United States* v. *Kehoe,* 516 F2d 78, 86; cf., *United States* v. *Tateo,* 377 US 463, 467). If, on the other hand, the termination is due to the "fault" of the prosecution, a retrial is prohibited under historical and current double jeopardy principles.

Accordingly, I dissent and vote to reverse and reinstate the appeal of the People in the Appellate Division and to remit the proceedings to that court.

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Order affirmed. Opinion by Jones, J. All concur except Breitel, Ch.J., who dissents and votes to reverse in an opinion in which Jasen, J., concurs.